Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of	)	
the Cable Television Consumer	)	MM Docket 93-215
Protection and Competition Act	)	
of 1992	)	
	)	
Rate Regulation	)	

REPLY COMMENTS OF CABLEVISION SYSTEMS CORPORATION

CABLEVISION SYSTEMS CORPORATION

Howard J. Symons
Christopher J. Harvie
Leslie B. Calandro
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
202/434-7300

Its Attorneys

Of Counsel:

Robert S. Lemle
Senior Vice President and
General Counsel
Cablevision Systems Corporation
One Media Crossways
Woodbury, New York 11797

September 14, 1993

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of	)	
the Cable Television Consumer	)	MM Docket 93-215
Protection and Competition Act	)	
of 1992	)	
	)	
Rate Regulation	)	

REPLY COMMENTS OF CABLEVISION SYSTEMS CORPORATION

Cablevision Systems Corporation ("Cablevision"), by its attorneys, hereby submits its reply comments in the above-captioned Notice of Proposed Rulemaking ("Notice").

INTRODUCTION AND SUMMARY

Among the principal objectives of the Cable Television Consumer Protection and Competition Act of 1992 ("Act" or "1992 Cable Act") is the deployment of an advanced telecommunications infrastructure.[1/] If that objective is to be realized, the Commission's cost-of-service rules must be specifically tailored to the unique economics and financial requirements of the cable industry. Congress specifically disavowed Title II regulation for cable because it recognized that cable operators do not

---

[1/] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(b)(3), 106 Stat. 1460, 1463 (1992). The Commission itself has acknowledged the importance of this goal in fashioning its cost-of-service rules. See e.g., Notice at ¶ 9; Rate Regulation (Report and Order and Further Notice of Proposed Rulemaking), 72 R.R.2d 733, at ¶ 262 (1993).

resemble traditional utilities.[2/] Such "cumbersome" regulation is unnecessary to ensure reasonable rates for cable service, and it would inhibit infrastructure investment by cable operators.

Unsurprisingly, three Regional Bell Operating Companies (the "Joint Commentors") ignore Congressional intent and the marketplace distinctions between cable operators and local exchange carriers and urge the Commission to impose upon cable "the same cost-of-service standards . . . traditionally applied to telephone companies."[3/] To do so -- notwithstanding the vastly different economics and financial requirements of cable companies and providers of monopoly telephone service -- would hobble cable operators' efforts to deploy facilities that could eventually provide competitive local telecommunications services.

Such a result is undoubtedly the Joint Commentors' intent. Tellingly, they attempt to justify their demand for stringent cost-of-service regulations by reference to cable's embryonic efforts to offer telephone customers a competitive choice, asserting that "cable . . . has . . . fund[ed] its move into telephony with revenues from captive cable subscribers"[4/] and citing, among other examples, Cablevision's recent agreement to

---

[2/] See e.g., H.R. Rep. No. 628, 102d Cong., 2d Sess. 83 (1992)("House Report").

[3/] Joint Comments of Bell Atlantic, the NYNEX Telephone Companies, and the Pacific Companies ("Joint Comments") at 3.

[4/] Id. at 7.

provide (jointly with AT&T) a variety of telecommunications services to the several campuses of Long Island University .[5/]

Contrary to the Joint Commentors' self-serving rhetoric, the Commission's task in this proceeding is not to "ensure regulatory parity between the cable and telephone industries."[6/] Rather, its goal must be to develop rules that enable operators to recover costs that would not be recoverable under the rate benchmarks. The Joint Commentors' efforts to analogize the economic incentives of cable companies and local exchange carriers, and their examples of alleged cross-subsidization, are unpersuasive.

I. THE COMMISSION SHOULD REJECT THE JOINT COMMENTORS' CALL FOR "REGULATORY PARITY" BETWEEN CABLE AND TELCOS

Unlike monopoly providers of an essential service like telephony, cable companies do not exercise bottleneck control over an essential facility and have no "captive" subscribers from whom "cross-subsidies" can be extracted to fund new investments. While the Joint Commentors and other local exchange carriers enjoy virtually 100% penetration, for instance, many cable systems in urban and suburban areas around the country are still

---

[5/] Id. at 7 n.8.

[6/] Id. at 4. Despite their call for "regulatory parity" between the cable and telephone industries, there is no evidence that the Joint Commentors are willing to submit to the local regulation of their basic services and other local franchise requirements to which cable operators are subject.

below 50% penetration.[7] Cable also experiences considerable subscriber churn and faces the prospect of vigorous competition from a host of alternative multichannel technologies,[8] a prospect far more immediate than any potential competitive threat to the telephone companies' basic service monopoly.

A regulatory scheme that disregards these fundamental differences between the cable and telephone industries would unfairly burden the cable industry and seriously damage its ability to attract investment capital. Local telephone companies can attract capital even though they are subject to a pervasive regulatory scheme because the vast bulk of their multi-billion revenue stream remains largely insulated from market risk.[9] The imposition of stringent cost-of-service rules on the cable

---

[7] For example, Cablevision's system in Boston has a penetration rate of roughly 44%. Cablevision's New York City system has a penetration rate of about 33%, while its Chicago system has an approximate penetration rate of 45%.

[8] See Comments of Cablevision Systems Corporation at 10 and accompanying notes (filed Aug. 25, 1993).

[9] See e.g., Statement of Robert E. Allen, Chairman of the Board and Chief Executive Officer, AT&T, on S. 1086, "The Telecommunications Infrastructure Act of 1993," before the Senate Committee on Commerce, Science & Transportation, Subcommittee on Communications, September 8, 1993 at 9 ("In 1992 . . . 99.86% of AT&T's access payments went to the local exchange carriers").

Telephone company shareholders are enjoying returns which exceed the returns accruing to investors in S&P 400 companies. Michael Foley and Ann Thompson, Electric and Telephone Utility Stockholder Returns: 1972-1992, National Association of Regulatory Utility Commissioners, September 13, 1993, at 15-20. These earnings levels make it "clear that the arguments often advanced by utility representatives regarding the 'inadequacy' of stockholder earnings and the inability to attract capital for new facilities are unfounded and without merit." Id. at 39.

industry, whose investors assumed a far different regulatory environment and which faces the prospect of intense competition from alternative technologies, would prohibitively raise cable's cost of capital.[10/]

The Joint Commentors' call for regulatory parity also misapprehends the function of the cost-of-service rules within the overall regulatory framework devised by the Commission. Stringent cost-of-service regulation is more appropriate for the local telephone business because there is no record of competitive pricing for regulators to use as a reference point. Accordingly, regulators focus closely on ensuring a close fit between rates and costs in an effort to replicate the process which would occur in a competitive market. In the cable context, however, the Commission already has determined that its competitive benchmarks will be its principal regulatory reference point. The goal of cost-of-service regulation in the cable industry is not to obtain the most precise possible relationship between rates and cost. Rather, the objective is to determine whether operators have valid and economically justified reasons for charging rates which exceed the benchmarks. It is unnecessary -- and counterproductive -- to accomplish that objective by constructing a replica of Title II regulation.

The Joint Commentors nonetheless aver that "regulatory parity" is necessary to prevent cable operators from using

---

[10/] See e.g., Comments of Cablevision Systems Corporation at 4-6, 17-18.

subscriber revenue to "fund" their ventures into new telecommunications markets.[11/] While their concern with protecting ratepayers is heartening, the Joint Commentors' efforts to apply the concept of cross-subsidization to the cable industry are inappropriate.

Because they have historically enjoyed a guaranteed rate of return on their monopoly ratebase, local telephone companies have the incentive to misallocate costs to that ratebase.[12/] The concern with "cross-subsidy" only arises when a regulated monopoly with a guaranteed rate of return controls an essential service. In that instance, regulators give close attention to ratebase valuation and cost allocation to prevent the monopoly provider of the essential service from loading unnecessary costs into the ratebase or allocating ratepayer revenue to its unregulated ventures.

The history of telephone regulation is rife with examples of this kind of behavior,[13/] but these concerns simply do not arise in the context of cable regulation because cable is not an

---

[11/] Joint Comments at 6-7.

[12/] See e.g. United States v. AT&T, 552 F.Supp. 131, 161-63 (D.D.C. 1982), aff'd sub nom., Maryland v. United States, 460 U.S. 1001 (1983).

[13/] See e.g., Dr. Mark N. Cooper, Divestiture Plus Eight: The Record of Bell Company Abuses Since The Break-up of AT&T, Consumer Federation of America, December 1991; In the Matter of New York Telephone Co., Apparent Violations of the Commission's Rules and Policies Governing Transactions With Affiliates, 5 FCC Rcd. 5892 (1990)(NYNEX agreed to pay a $1.42 million fine for alleged improper use of ratepayer money to cross-subsidize a subsidiary), recon. denied, 6 FCC Rcd. 3303 (1991), aff'd 71 R.R. 2d 1260 (D.C. Cir. 1993).

essential service and it is not guaranteed a return on its investments. Rather, cable operators are cash flow companies whose economic health is measured not by earnings on a "ratebase" but rather on the basis of cash flow. That cash flow, moreover, has been significantly jeopardized as a result of the rate benchmarks recently adopted by the Commission.[14/]

Without a guaranteed rate of return, cable companies lack the economic incentives of a telephone company to burden their core businesses with unnecessary costs. The potential for "cross-subsidization" by a cable operator is further reduced by the ease with which competitors may enter the multichannel video programming distribution business. That competition has been greatly facilitated by the 1992 Cable Act's program access provisions.[15/] By contrast, competitive entry into the local telephone business is hindered not only by the cost of entry but also by the legal and regulatory barriers to local competition erected and maintained by most states.

In short, the traditional elements that give rise to a concern with cross-subsidization are absent in the context of cable regulation. While some cable operators are using revenues earned from their cable business to invest in new services and lines of business, it is cable's shareholders -- and not its subscribers -- who bear the risk of these new investments. If these new ventures fail, operators simply do not have the ability

---

[14/] See Comments of Cablevision Systems Corporation at 5.

[15/] 47 U.S.C. § 548.

to recover those costs from their cable subscribers, because of the non-essential nature of cable service and the prospect of competition from alternative providers.

II. THE JOINT COMMENTORS HAVE MISCHARACTERIZED CABLEVISION'S PROVISION OF TELECOMMUNICATIONS SERVICE TO LONG ISLAND UNIVERSITY

The Joint Commentors cite Cablevision's provision (jointly with AT&T) of telecommunications services to Long Island University ("LIU") as an alleged example of cable's use of revenues from "captive subscribers" to fund its "move into telephony." As demonstrated above, Cablevision has neither the economic incentive nor the ability the engage in "cross-subsidization." The Joint Commentors offer no proof of their allegation, nor can they, because the claim is totally without foundation. Their "evidence" consists of the statement that Cablevision/AT&T proposed "a per line charge for telephone service that was two-thirds of that in New York Telephone's bid."[16/] Apparently, the Joint Commentors did not consider the possibility that Cablevision/AT&T could offer service more efficiently than New York Telephone. The Joint Commentors also suggested that Cablevision/AT&T are offering "free telephone service,"[17/] completely mischaracterizing the nature of Cablevision's arrangement with LIU.

[16/] Joint Comments at 7 n.8.

[17/] Id. (emphasis in original).

A brief review of the facts of LIU's deal with Cablevision/AT&T suggests that the Joint Commentors are more interested in forestalling competition than in protecting cable subscribers. LIU selected Cablevision/AT&T to install a multi-purpose communications system at its Brooklyn, C.W. Post and Southampton campuses after receiving bids from Cablevision/AT&T as well as from New York Telephone. As the winning bidder, Cablevision/AT&T will construct a PBX on each campus, as well as a fiber optic link interconnecting the three campuses. The fiber-optic campus interconnection will enable LIU personnel to communicate between the campuses and to provide such services as distance learning and teleconferencing between the campuses and the University Center. LIU also sought a network that would provide student dorm rooms with access to cable, telephone, and computer data link services. Cablevision/AT&T was able to meet that requirement and, unlike New York Telephone, was willing to consider LIU's interest in possibly assuming ownership of the network sometime in the future.

The Joint Commentors specifically assert that Cablevision has offered LIU students and faculty "free campus and local telephone service."[18/] The suggestion that Cablevision is offering free local telephone service is completely without merit. Cablevision/AT&T will, in fact, be a reseller of New York Telephone's local service to users of the LIU network. While intra-campus telephone calls by LIU students and faculty are

---

18/ Id.

free, there is nothing unusual about offering such an intercom service without an additional charge.

In sum, Cablevision/AT&T was able to provide LIU with the kind of broadband, multi-use telecommunications network that regulators and policy-makers are trying to encourage -- and at a lower price and more favorable terms and conditions than the provider of basic exchange service. During the entire bidding process, there is no indication that New York Telephone ever raised the argument that Cablevision was somehow subsidizing its proposal with cable revenues. Having lost the LIU bid, New York Telephone and the other Joint Commentors now suggest that this salutary example of competitive choice in telecommunications warrants stricter regulatory scrutiny of cable. Perhaps only a monopolist would seek to use the offer of a lower bid by a competitor as justification for pervasive regulation of that competitor.

CONCLUSION

The Joint Commentors' distorted characterization of the arrangement between Cablevision/AT&T and LIU reveals the transparency of their effort to use the regulatory process to place cable at an artificial disadvantage in the increasingly competitive telecommunications marketplace. Their call for regulatory parity between the telephone and cable industries ignores fundamental differences between the two industries that must be taken into account in the development of a rational

regulatory scheme for cable. Adoption of cost-of-service rules premised on the idea of regulatory parity would violate Congressional intent and thwart the goal of encouraging infrastructure investment. The Commission should reject the Joint Commentors' arguments and develop cost-of-service rules that are specifically tailored to the unique circumstances of the cable industry.

Respectfully submitted,

CABLEVISION SYSTEMS CORPORATION

Howard J. Symons/LBC

Howard J. Symons
Christopher J. Harvie
Leslie B. Calandro
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
202/434-7300

Its Attorneys

Of Counsel:

Robert S. Lemle
Senior Vice President and
General Counsel
Cablevision Systems Corporation
One Media Crossways
Woodbury, New York 11797

September 14, 1993
D20613.1

CERTIFICATE OF SERVICE

I, Leslie B. Calandro, do hereby certify that copies of the foregoing Reply Comments of Cablevision Systems Corporation were served on the following this 14th day of September, 1993, by either first-class mail, postage prepaid, or by hand delivery.

Leslie B. Calandro

Leslie B. Calandro

*Roy J. Stewart
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W., Room 314
Washington, DC 20554

*Robert M. Pepper
Chief, Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W., Room 822
Washington, DC 20554

*Jay M. Atkinson
Federal Communications Commission
1919 M Street, N.W., Room 822
Washington, DC 20554

Mark L. Evans
Alan I. Horowitz
Anthony F. Shelley
Miller & Chevalier, Chartered
655 15th Street, N.W.
Washington, DC 20005
Attorneys for the Joint Commentors

Michael E. Glover
Edward D. Young, III
John Thorne
1710 H Street, N.W.
Washington, DC 20006
Attorneys for the Bell Atlantic Telephone Companies

Mary McDermott
Shelley E. Harms
120 Bloomingdale Road
White Plains, NY 10605
Attorneys for the NYNEX Telephone Companies

James P. Tuthill
Lucille M. Mates
140 New Montgomery Street
San Francisco, CA 94105

Alan F. Ciamporcero
1275 Pennsylvania Avenue, N.W.
Washington, DC 20004
Attorneys for the Pacific Companies

*By Hand

D20745.1